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MICHAEL RODAK, JR., C

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979
No. 80-11

J. GREGORY MERRION, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,

Respondents.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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QUESTIONS PRESENTED

I. Does the authority of an Indian Tribe to tax non-members, when on Indian land within a reservation, derive solely from the tribal power to exclude those non-members from that land, and the concommitant power to establish conditions for their entry upon such land?

II. If the answer to Question I is in the affirmative, may an Indian Tribe exercise that power to exclude a non-member from Indian land within a res-

ervation for failure to pay a tribal tax, under the following circumstances:

(1) The non-member has entered upon the Indian land and undertaken commercial activities there pursuant to a lease agreement with the Tribe which has been authorized by a federal statute and approved by the Secretary of Interior in accordance with that statute;

(2) The lease agreement does not include payment of the Tribal tax as a condition of remaining in possession and continuing the commercial activities authorized by the lease agreement; and

(3) The non-member is in full compliance with all terms and conditions of the lease agreement?[1]

[1]The Petitioners present in their brief six questions for review. Our questions I and II rephrase Petitioners' Questions 1 through 3 and that portion of their Question 4 relating to preemption of tribal taxing power by the total federal regulatory scheme. We do not here discuss that portion of Question 4 relating to the effect of 25 U.S.C. § 398c; nor do we discuss Questions 5 and 6.

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INTEREST OF THE STATE OF WASHINGTON

The interest of the State of Washington is set forth at length in the Brief of State of Washington as Amicus Curiae in Support of Petition for Writ of Certiorari, pp 2-5. We would respectfully refer the Court to our discussion there, rather than repeat it here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our starting point, of course, must be this Court's decision, on June 10 of this year, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ... U.S. ....., 48 LW 4668. This decision reaffirmed the tribal "authority to tax the activities or property of non-Indians taking place or situated on Indian lands * * *" 48 LW at 4673.

But what is the source of this authority? Is it found in the power of Indian Tribes to exclude non-members from Indian lands, and the concomitant power to set conditions for their entry upon those lands? Or, on the other hand, is the source found in some sort of general governmental power over all persons within the territorial boundaries of the reservation, be they members or not?

The difference, we believe, is critical here. If taxing authority over non-members finds its source in the tribal power to condition entry upon Indian lands, then one must ask a further question. May the Tribe exercise that power when, as here (1) the non-member is undertaking commercial activities on those

lands pursuant to a lease agreement with the Tribe that has been authorized by a federal statute, and approved by the Secretary of Interior in accordance with that statute; and (2) that non-member lessee is in full compliance with all of the terms and conditions in the lease agreement, but those terms and conditions do not include any requirement to pay the tribal tax?

Does the statute authorizing the lease agreement, in short, contemplate a real lease, which allows the lessee to remain in possession so long as he complies with the terms and conditions of the lease? Or, on the other hand, does the statute envision a sham lease, allowing the tribal landowner to dispossess its lessee even though he be in complete compliance with the lease agreement?

This problem does not arise, at least in so acute a form, if the tribal authority to tax non-Indians finds its source instead in some sort of general governmental power over all persons within the reservation. A simple example may help illustrate our point.

A State, of course, is itself a landowner, as is the Jicarilla Apache Tribe here. Those state lands may contain oil and gas, as do the tribal lands here. Accordingly, the State may enter into leases with private operators, under which those operators have the right to extract the oil and gas in return for royalty payments to the State, as stipulated in the lease agreement.

If the state legislature imposed a new tax upon that operator, such as a severance tax, or increased the rate of an already existing tax, that operator would have no grounds for complaint in the judicial forum, though he might well have in the political. The taxing power of the legislature applies to him just as much as to anyone else within the State's jurisdiction. And the source of the legislature's power to impose this tax is the same as its power to pass any other law—its general governmental power as the legislative body of a sovereign state.

In enforcing this tax, the State may use any and all of the usual mechanisms it employs for any other tax; e.g., subjection of the taxpayer to its courts, seizure of the taxpayer's property for nonpayment, criminal or civil fines, and perhaps even incarceration. Further, like the power to impose the tax in the first place, the power to employ these sanctions is in no way dependent upon the State's status as an owner-lessor. (Our hypothetical severance tax would, we presume, be imposed upon all extractors of oil and gas, whether operating on leased lands, public or private, or on lands which they own themselves.)

The tribal authority to tax non-members is not, we contend, like the State's power to tax in our example. It is not based upon any sort of general governmental authority over all persons within a territorial jurisdiction, as is the power of the State.

To show why this is so, we examine this Court's opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191

(1978), and demonstrate that the reasoning of this opinion is just as applicable on the civil side as it is on the criminal side of any assertion of general governmental power over non-members.

We also examine the legislative history of the Indian Reorganization Act of 1934, 48 Stat. 984, to show that Congress has likewise deliberately rejected a policy of vesting general governmental powers, civil or criminal, over non-members.

In certain narrow, specific areas, Congress has admittedly granted to Indian Tribes a type of jurisdiction over non-members. See 18 USC 1165, relating to unauthorized hunting and fishing on Indian lands; 18 USC 1161, relating to control of intoxicants on Indian reservations; and 42 USC 7474, relating to determination of air quality standards for reservation lands. Far from reflecting any congressional assumption of any general criminal or civil jurisdiction reservation-wide over non-members, these statutes reflect exactly the opposite assumption. And we show that, at least until recent years, the executive branch has shared that assumption along with the Congress.

Nor does *Colville* require a different conclusion. As already observed, the Court there reaffirmed the authority of a Tribe to tax non-Indians. That authority, however, was expressly confined to transactions or property situated on Indian lands. More importantly, the judicial and administrative decisions cited by the Court in support of that taxing power

involved situations in which the only enforcement sanction invoked was expulsion of a non-member's person or property from those Indian lands. The taxation power, in short, found its source in the tribal power to exclude, and not in a general governmental power over non-members.

But may that power to exclude be invoked in this case? We show that it may not, by reason of the statutory provisions under which the leases involved here were executed, and approved by the Secretary of Interior. Act of Mar. 3, 1927, 44 Stat. 1347, 25 USC 398a-398e. That act contemplates *real* leases, granting the lessee the right to remain in possession and conduct the activities authorized by the lease agreement so long as he complies with its terms. Congress, in short, did not envision leases which a Tribe could unilaterally turn into a sham.

ARGUMENT

I. THE ISSUE OF TRIBAL GOVERNMENTAL POWERS OVER NON-MEMBERS[2]

A. Under Oliphant v. Suquamish Tribe, the Only Available Sanction Against a Non-Member for Violation of a Tribal Law or Regulation is Expulsion.

Before examining the principles established by the Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, we should note what *Oliphant* did *not* decide. It did not decide that the Suquamish Tribe

[2]Our discussion in Part I of this argument follows closely and somewhat expands upon our discussion at pp. 18-24, and 27-29 of our amicus brief on the merits in Montana v United States, No. 79-1128. We view the two cases as very closely connected on certain critical issues.

could not prohibit Mr. Oliphant and Mr. Belgarde, the alleged offenders, from ever again coming onto Indian lands within the Port Madison Reservation, and forcibly eject them should they do so.[3] *Oliphant*, in short, was not an expulsion case. Rather, *Oliphant* was a case in which the tribe claimed the power to impose on a non-member the full range of criminal sanctions, for violation of its laws, that it could admittedly impose on its members.

Does the reasoning by which this result was reached apply on the civil, as well as the criminal, side of a tribal assertion of general governmental power against a non-member? We here show that it does.

The structure of the opinion should here be noted. The first part examines the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. 435 U.S. 196-206. That presumption, however, is "not conclusive on the issue before us," but is entitled to "considerable weight". 435 US at 206. Neither is the second part, which reviews the relevant treaty provisions, conclusive either. 435 US at 208. The conclusive part is the third, which begins:

> "But an examination of our earlier precedents satisfies us that, *even ignoring treaty provisions and congressional policy*, Indians do not have criminal jurisdiction over non-Indians absent

[3]Of course, the Indian Civil Rights Act, 25 U.S.C. § 1302, might well require that basic due process, such as an opportunity for a hearing, be afforded before any such expulsion is effective.

affirmative delegation of such power by Congress." (Emphasis supplied) 435 at US 208.

The third part *is* conclusive, independently of the first two. Significantly, none of the precedents examined in this third part directly involved the question of tribal jurisdiction over non-Indians, either civil or criminal. They did involve, however, the status of Indian tribes.

That status is one of subordination to and dependency upon the United States; it affects no only the relationship of the Indian Tribes with the United States Government as such, but the relationship of the Tribes with the non-Indian United States citizen as well.

> "* * * Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' *Johnson v. M'Intosh*, 8 Wheat 543, 574, 5 L.Ed. 681 (1823)." *Oliphant* 435 U.S. at 209.

And this diminishment of tribal sovereignty resulted in the loss of the tribal power to govern anyone but the Indians themselves.

> "In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows:
>
> [T]he restrictions upon the right of soil

> in the Indians amount * * * to an exclusion of all competitors (to the United States) from their markets; and the limitation upon their sovereignty amounts to the right of *governing every person within their limits except themselves.*

Fletcher v. Peck, 6 Cranch 87, 147." (Emphasis in original.) *Oliphant*, 435 U.S. at 209.

Obviously, what Mr. Justice Johnson was talking about in *Fletcher v. Peck* was the power of *governing*, whether the forms of governing be characterized as civil or criminal.

The opinion continues:

> "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. * * *"

Oliphant, 435 U.S. at 209, 210.

Simply because an assertion of governmental power is "civil" rather than "criminal" does not mean that the hazards to a United States citizen, and the risk to his personal liberties, are any less.

To illustrate: Perhaps the most pervasive and fundamental assertion of governmental power, on the civil side, is the taxing power, the same type of power

as is claimed by the Tribe here. The federal government, states, and local governments collect these taxes through voluntary compliance in most cases, but through compulsory enforcement mechanisms when necessary. Those enforcement mechanisms or sanctions include subjection of the taxpayer to the government's courts, forcible seizure of the taxpayer's property, and punishment of the taxpayer for non-compliance. That punishment might be through criminal proceedings; but it might be through civil fines as well; and civil proceedings might involve incarceration, for civil contempt.

It makes little difference to the taxpayer that he has lost his property or liberty through "civil" rather thn "criminal" proceedings.

Nor did the holding in *Oliphant* rest upon such a distinction, as the discussion of *Ex Parte Crow Dog*, 109 U.S. 556, clearly shows. The United States was there attempting to extend federal criminal law:

> "* * * by argument and inference only, * * * over aliens and strangers; over the members of a community separated by race [and] tradition, * * * from the authority and power which seeks to impose upon them the restraints of an external and unknown code * * *; which judges them by a standard made by others and not for them. * * * It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by * * * a different race, according to the law of a social state of which they have an imperfect conception. * * *" 109 U.S. at 571. Quoted at 435 U.S. at 210, 211.

After this quotation, the Court in *Oliphant* continued:

> "These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs."

Oliphant, 435 U.S. 210, 211.

The rationale of *Crow Dog*, as applied in *Oliphant*, logically applies to *all* tribal law. Whether that law be criminal or civil, it is equally "external and unknown" to non-Indians.

Historically, the Indian tribes have argued that they have the status of separate nations, with their own inherent governmental power over their own members. As shown by such cases as *Talton v. Mayes*, 163 U.S. 376, *United States v. Wheeler* and *Crow Dog* itself, that argument has uniformly met with success. But, under *Oliphant* it is *precisely because of this separateness* that this power of Indian tribes must be confined to tribal members, and not be extended to non-Indians.

Two last points: as already suggested, *Oliphant* in no way affects a Tribe's treaty right to exclude or expel non-Indians. It does, however, prohibit an assertion of general governmental power, be that assertion categorized as "criminal" or "civil", in which the other usual sanctions or enforcement mechanisms are sought to be utilized by the Tribe.

Secondly, *Oliphant* in no way affects the power of Congress to delegate to Indian Tribes governmental

power over non-Indians. But Congress, in fact, has refused to do so, except in very narrow circumstances, as we shall next see.

B. In Adopting the Indian Reorganization Act of 1934, Congress Deliberately Denied to Indian Tribes Any General Governmental Power Over Non-Members.

The Indian Reorganization Act, as originally introduced in Congress, was a very different bill from that which eventually passed. (Act of June 18, 1934, 48 Stat. 984.) Those differences are of great significance here. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> "In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to *issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof *a charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned * * **" (Emphasis supplied)

Section 4 spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

> "(a) To organize and act as a *Federal municipal corporation*, to establish a form of government,

> to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.*" (Emphasis supplied)

Subsection (d) granted another important power:

> "(d) To establish courts *for the enforcement and administration of ordinances of the community*, which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community*, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * *." (Emphasis supplied)

Title IV of the bill also dealt with courts, establishing a Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal

courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Title I and Title IV did not survive. And a major reason was that the chairman of the Senate Committee on Indian Affairs, Senator Wheeler from Montana, was adamantly opposed.

In the hearing on S. 2755, the following exchange took place concerning Title I:

> "The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
> "Commissioner Collier [of the Bureau of Indian Affairs]. Yes.
> "The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.
> "I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there, your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it." Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV no better. Under discussion was an amendment, proposed by the BIA, involving the criminal jurisdiction of the court:

> "Commissioner Collier. Mr. Chairman, this amendment would leave with the proposed new court of Indian affairs all prosecutions for crimes insofar as they are prosecutions under the laws affecting Indian country.
> The Chairman. Yes; but it is perfectly ridiculous to set up this separate court." 1934 Hearings, p. 205.

The discussion then turned to the jurisdiction of the court, in the case of a non-Indian trying to collect a debt from an Indian. And Senator Wheeler expressed his views about the proposed court once again.

> "The Chairman. If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment.
> "Senator O'Mahoney. Senator, I don't think you agree with this provision.
> "The Chairman. Well, I certainly do not agree with it, and I do not think the Indians if they understood it in the Northwest would want it, because of the fact that it would just simply hamper them and retard them rather than do them any good.
> "Commissioner Collier. Mr. Chairman, we have explained that we did not regard this section as an integral part of the bill, as indispensable at all.
> "The Chairman. Yes; I am glad of that." 1934 Hearings, p. 208.

What happened next is best explained in Senator Wheeler's own words:

> "The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * *" 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 48 Stat. 984). Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over Indians and non-Indians which the BIA had hoped to attain for the Indians. And that fact is reason enough for this court to deny the claim to any such powers now.

C. Congress Has Consistently Acted Upon the Assumption that Indian Tribes Do Not Have Inherent General Governmental Power over Non-Members.

Since 1934, Congress has delegated to Indian Tribes certain governmental powers over non-members. For example, in 1953, Congress removed the general prohibition of alcoholic beverages in Indian Country, and allowed Indian Tribes to regulate, with the approval of the Secretary of Interior, the introduction of alcoholic beverages into Indian Country, so long as state law was also complied with. Act of Aug. 15, 1953, 67 Stat. 586, 18 USC 1161. Under 18 U.S.C. 1154(c), Indian Country would include fee patent land, owned by non-Indians, so long as that land was within the exterior boundaries of a reser-

vation and was not within a "non-Indian community". See *United States v. Mazurie*, 419 U.S. 544, 547 (1975).

If an Indian Tribe has inherent general governmental power over non-members reservation-wide, there seems little need for Congress to have made that delegation to the Tribes in 1953.

Congress took a similar action in 1960. In the Act of July 12, 1960, 74 Stat. 469, 18 U.S.C. 1165, it prohibited the unauthorized entry upon Indian lands for the purpose of hunting or fishing. The reason for this congressional action was made explicit in S. Rep. No. 1686, 86th Cong, 2d Sess, 2-3 (1960):

> "* * * Indian tribal law is enforceable against Indians only; not against non-Indians.
> * * *
> "Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges."

Again, in the Clean Air Act Amendments of 1977, 91 Stat. 685. 735, it is provided that for purposes of designation of areas by class for air quality standards, "lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." 42 U.S.C. 7474(c).

And again, in the Surface Mining and Reclamation Act of 1977, 91 Stat. 445, 523, the Secretary of Interior is directed to prepare:

> "[P]roposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforce-

ment of regulation of surface mining of coal on Indian lands." 30 U.S.C. 1300 (a).

The term "Indian lands" is defined to include all lands within the exterior boundaries of a reservation, whether in Indian ownership or not 30 U.S.C. 1291 (9).

The pattern of congressional action is clear. In specific areas, in which it determines, after sufficient study, that there is a tribal interest meriting federal protection, Congress will delegate to a Tribe a limited measure of governmental power over non-members. As shown by our first, third, and fourth examples,[3] this power may extend to non-members on non-Indian lands. But implicit in this pattern is the assumption by Congress that its action is required in order that a Tribe may have these powers at all.

This same assumption, moreover, has been followed by Congress in the area directly involved here, taxation. In 25 U.S.C. 319, the Secretary of Interior is authorized to grant easements for telephone and telegraph lines across Indian reservations. In 25 U.S.C. 321, like authority is granted for oil and gas pipelines. In both statutes, the Secretary is also authorized to impose a tax upon these facilities "for the use and benefit of the Indians." The conferral of this authority upon the Secretary would make little sense, and would constitute an essentially useless act, if the Tribes themselves had the inherent authority to impose these same taxes upon these same facilities.

[3]So far as we can ascertain, our fourth example is still in the study stage, and has not yet been implemented by Congress.

D. The Understanding of the Executive Branch Has Been That Indian Tribes Possess No Inherent General Governmental Power over Non-Members.

In 1934, shortly after passage of the Indian Reorganization Act (see pp. 11-15, supra), the Solicitor of the Department of Interior, Mr. Margold, was squarely faced with the question of the extent of an Indian Tribe's inherent sovereign power over non-members. The specific question was the extent of a Tribe's inherent power of eminent domain. Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484, 489-491 (Dec. 13, 1934).[4]

The opinion first considered the source of this tribal power.

> The power of eminent domain is one of the usual powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash R.R. Co.* (223 U.S. 390, 404), "one of the powers vital to the public welfare of every self-governing community."
>
> No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on "Powers of Indian Tribes" (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard [Indian Recognition] Act at 489.

Yet Solicitor Margold concluded:

> I am of the opinion that the Indian Service is correct "in assuming that a tribe organized un-

[4]This important opinion remained unpublished until this recent two volume compilation.

> der section 16 may exercise the power of eminent domain in the acquisition of land as against its members, but not in the case of land owned in fee by non-members." *Ibid.*

This inherent power of eminent domain, which is "one of the usual powers of sovereignty", may be exercised only with respect to tribal members.

From this, Solicitor Margold draws another important conclusion.

> It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), "any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." * * *
>
> Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens.
>
> The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law. At 490.

Non-Indians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

> Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the lands of non-Indians. An Indian

> tribe will have whatever rights of condemnation the laws of the State may give to it.
>
> * * *
>
> Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490, 491.

As this opinion explicitly recognizes, a tribal claim of general governmental power, even if it be on the civil side, and whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members. And as the opinion reminds us, our system of government has no room for "threatened oppression in the form of condemnation, taxation, or other incidents of social control" over those non-members.

E. Washington v. Confederated Tribes of the Colville Indian Reservation, ___ U.S. ___, 48 LW 4668 (June 10, 1980) Supports the Conclusion That The Authority of a Tribe to Tax Non-Members is Derived from the Power to Exclude Non-Members From Indian Lands, and not from any General Governmental Power over Those Non-Members.

We now arrive at *Colville* itself. The Court there stated:

> "The power to tax transactions occurring *on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. Cf. *United States v. Wheeler*, 435 U.S. 313 (1978)" (Emphasis

supplied; 48 LW 4763.)
And again:

> "*Authority to tax the activities or property of non-Indians taking place or situated on Indian lands*, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934. 48 Stat. 987, 25 U.S.C. § 476." (Emphasis supplied; *Ibid*)

The reference to "trust lands" and "Indian lands" suggests that the taxing power over non-members is derived from the tribal power to exclude them from those lands. But the reference to *Wheeler* seems to suggest otherwise.[5]

The problem is easily resolved, we suggest, by examining the authorities cited by the Court in its discussion of the tribal taxing power. Thus, it cited Powers of Indian Tribes, 55 ID 14, 46 (1934), as follows:

> " 'Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.' " Ibid. (Emphasis added). 48 LW 4673.

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[5]The validity of the tribal "tax" in *Colville*, we suggest, was actually not dependent at all upon the fact that the purchase of the cigarettes took place on Indian land. As we pointed out in the State's reply brief in *Colville*, p. 17, the only enforcement mechanism utilized was for the smoke-shop operator to refuse to sell cigarettes to any non-Indian customer who refused to pay the tax. And for this reason, the tax could just as easily be imposed and enforced *off* Indian lands as on them. For this same reason, we suggested that the case did not involve a true tribal "tax" at all, and that the validity of the tax was really not an important issue.

The author of this opinion, dated Oct. 25, 1934, was Interior Solicitor Margold, who, we have just seen, stated approximately two months later, on Dec. 13, 1934, that inherent tribal sovereignty did not include the power to condemn—or tax—the property of non-members. Solicitor Margold must then be basing the tribal taxing power over non-members upon the power to exclude from Indian lands, and to condition entry. And the reference to "privileges of trade, residence, etc., to which taxes may be attached as conditions" compels that conclusion.

The other authorities cited by the Court in *Colville* support that same conclusion as to the source of tribal taxing power over non-members. Thus, in 17 Op. Atty. Gen. 134 (1881), "Intruders on Lands of the Choctaws and Chickasaws," the question was whether non-Indians who were on lands of these Indians without complying with their permit laws could be forceibly removed therefrom by the Department of Interior. The answer, of course, was that they could.

In 7 Op. Atty. Gen. 174 (1855), one of the questions was whether an Indian court had civil jurisdiction over a white man who had *voluntarily made himself a member of the Chickasow Nation, and was exercising all the rights of a Chickasaw.* Again, the answer was yes.

In 23 Op. Atty. Gen. 214 (1900), "Trespassers on Indian Lands," the question again was whether a non-member could be forcibly removed by the United States for failure to pay a tribal permit or licensee

fee on the non-member's business. Again, the answer was yes.

Similarly, the three decisions cited in *Colville*, *i.e.*, *Buster v. Wright*, 135 F. 947 (CA 8 1905), appeal dismissed. 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (CA 8 1956); and *Morris v. Hitchcock*, 194 U.S. 384 (1904), were all removal cases.

One last observation on this point. Although the tribal power to exclude non-members from Indian lands, and to attach conditions upon entry, is similar to that of an ordinary landowner, there is an important difference. The Tribe can exercise that power, not only with respect to lands in tribal ownership, but also with respect to lands owned by its members.[6] By reason of this difference, that power can fairly be characterized as a power of "sovereignty"; and in his Oct. 25, 1934 opinion, quoted above, Mr. Margold so characterized it. But as he himself made clear two months later, this should not be confused with the "sovereignty" which a state or the federal government exercises when it imposes a tax. That sort of sovereignty, when exercised by a Tribe, is applicable only to tribal members.

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[6]As shown by *Morris v. Hitchcock*, supra, which involved the application of the Curtis Act, Act of June 28, 1898, 30 Stat. 495, the power to condition entry may even apply to non-Indians when on their own lands, if there is a federal statute which recognizes such a power.

II. THE ISSUE OF THE TRIBE'S POWER TO EXCLUDE AND CONDITION ENTRY UNDER THE CIRCUMSTANCES IN THIS CASE.

On this issue, there may actually be no controversy with the Tribe. For the Tribe appears to agree that the Petitioners have valid leases, and that accordingly the Tribe has no power to remove or exclude them.[7] The Petitioners' leases, in short, are real leases and not sham leases.

Nevertheless, a brief discussion may be in order, in anticipation of a possible change in the position of the Tribe on this point.

We start with the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. 398a-398e. That Act, which authorizes the leasing of lands on executive order reservations for oil and gas production, was designed to resolve the confusion and uncertainty then existing on two critical questions:

Who held the beneficial interest in the oil and gas on these reservations? Was it the United States? Or the Tribe? Further, what statutory authority, if any, existed for the leasing of these lands for oil and gas production?

Senator Bratton of New Mexico explained how these problems arose.

Mr. President, I think the question now before

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[7]See Brief in Opposition of Respondent Jicarilla Apache Tribe, 18, in which the Tribe discusses *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (CA 8, 1956), and concludes:

"*As in the present case*, the non-Indian lessee was already on the reservation pursuant to an authorized lease. Thus, the power to exclude could not have been the basis for the Court's approval of the tax because *the Tribe could not exclude or remove the holder of a valid lease.*" (Emphasis supplied)

the Senate is of sufficient importance and magnitude to justify consuming some time in placing before the Senate just what we are about to do.

Prior to 1871 the method of establishing reservations for the occupancy of Indians was through treaties entered into between the United States and the Indian tribes. Reservations were created and established in that manner. In 1871 the procedure was changed and the method of creating reservations by treaty was discontinued. The new method was adopted which was to create such reservations by Executive orders entered by the President from time to time. Under that method various reservations were created. At the present time they are located in 10 different States, and the area aggregates about 23,000,000 acres of land. It is that land with which we are dealing in this bill.

Prior to 1920 we had what was commonly called the placer filing law, under which locators could take up and acquire the right to explore land after discovery of minerals, by staking the land, recording the notice of filing in the office of the county clerk, and otherwise complying with the law then in force.

In 1920 that law was repealed, and there was enacted what is commonly called the general leasing act, approved February 25 of that year, which authorized the Secretary of the Interior to execute leases for oil and gas purposes upon lands constituting the public domain belonging to the United States. In due time the question arose as to whether that law applied to executive-order Indian reservations, and of course that question turned upon where the title to those lands was vested; that is, whether the title remained in the United States or whether it was vested in the Indians. The question was submitted to [Interior] Secretary Fall, and in 1922 he rendered an exhaustive opinion holding that,

those lands were owned by the United States, subject to the right of occupancy of the Indians, and that consequently the general leasing act applied.

Following that decision a number of applications were filed, covering lands located within those reservations. The number of such applications which are now pending before the department has been variously stated from two hundred and odd to 475. About 20 of those received favorable action by the Secretary of the Interior, and permits were issued in accordance with the provisions of the general leasing act. Those lands are embraced within the Navajo Reservation, which consists of about 10,000,000 acres of land, located in the States of Utah, Arizona, and New Mexico, and perhaps some in Colorado. The question was debated and continued to be one of controversy until in 1924, when Attorney General Stone rendered an opinion in which he held that the general leasing act did not apply. His opinion will be discussed later. He reached that conclusion from two or three considerations.

Of course, at that time the applications were suspended. The Interior Department, harmonizing with the opinion of the Attorney General, declined to grant any additional permits. The 475 applications, or whatever the number may be, remained and still remain on file in the Interior Department. 67 Cong. Rec. 10913, 10914, June 8, 1926.

Senator Bratton further explained that, in accordance with the position taken in the Attorney General's opinion, the United States brought an action in Federal court in Utah to have the twenty or so leases previously issued declared void and cancelled. The Federal court, however, disagreed with

the Attorney General, held that the 1920 Act applied, and refused to cancel the leases.

The United States appealed, the Court of Appeals certified the question to this Court, where it apparently remained pending. 67 Cong. Rec. 10914.

As again stated by Senator Bratton:

> Therefore we are in this position: If the Federal court of Utah was correct and the general leasing act of 1920 does apply to these lands, the Indians own no interest in the oil and gas or other minerals, but merely possess the right of occupancy. If that decision is affirmed the royalty or the income from the development of those lands for oil and gas purposes will be divided in accordance with the provision of the general leasing act, which is 52.5 per cent to the reclamation fund, 10 per cent to the General Treasury, and 37.5 per cent to the State in which the land is located.
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> * * *
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> If we fail to enact legislation and the Supreme Court of the United States should agree with the Federal court of Utah that title to such lands is vested in the United States, the Indians would have no interest in any part of the royalty therefrom; so that it is important that we enact legislation of some kind upon this subject. *Ibid.*

The oil companies had no less a problem. If the opinion of the Attorney General was correct, and the Federal court in Utah incorrect, there would have apparently been no statutes authorizing any leasing at all of the lands on executive order reservations. The twenty or so leases previously issued would remain invalid, and no future leasing would occur.

The 1927 Act solved these problems. In section 1,

it provided that unallotted lands within the limits of any executive order reservation "may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (43 Stat. 244)". 25 U.S.C. 398a. The Act of May 29, 1924, codified as 25 U.S.C. 398, provides a general leasing authority for other Indian reservations.[8]

Section 2 of the Act (25 U.S.C. 398b) set aside in the Treasury of the United States, for the benefit of the Tribe, the moneys derived from the lease rentals, royalties, or bonuses.

Section 3 of the Act (25 U.S.C. 398c) provided that state or local authorities could levy taxes upon the "improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee" operating on the reservation, in the same manner as it might tax any other oil and gas operator. Further, "such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties."

Thus sections 2 and 3 assured both the Tribes and the states of a share of the benefits.

Lastly, section 5 provided relief for the operators who had been granted leases under the 1920 Act, but had seen their leases invalidated by the Attorney General's opinion. (See 34 Op. Att. Gen. 171 (1924)) Any such lessee who had spent money in developing the leased land, or had started drilling before Janu-

[8]Whether the 1924 Act applied to executive order reservations was a matter of debate. See colloquy between Senators Bratton and Wheeler on this point. 67 Cong. Rec. 10914.

ary 1, 1926 would be entitled to a lease of one-fourth the land covered in his original application.

It should be patently obvious that, in passing the 1927 Act, Congress intended to authorize the issuance of *real* leases, i.e., leases which entitled the lessee to remain in possession and continue his operations so long as he complies with the terms and conditions of the lease. The oil and gas industry ws assured of a statutory system whereby the resources on executive order reservations would be available for development. The Tribes and the States were assured of their share of the proceeds from that development. And even those lessees who had expended money on a false start were given relief. Fairness to these lessees was important to the Congress, and indeed was the major consideration in adopting section 5 of the Act.

It is simply inconceivable that Congress intended to allow a Tribe to disrupt completely this statutory system through the exercise of its power to remove non-members from the reservation.

The Tribe contends, we recognize, that the Petitioners' leases were issued pursuant to the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. 396a-396g, rather than pursuant to the 1927 Act. See Brief in Opposition of Respondent Jicarilla Apache Tribe, 11-15. Even if this contention is correct, however, this does not affect our basic submission. If the 1938 Act effectively replaced the 1927 Act, as the Tribe contends (see Brief in Opposition, supra, 12, 13) Congress

could hardly have intended to substitute for the 1927 Act, which provided for the issuance of real leases, a new statutory system which provided for the issuance of sham leases. The 1938 Act, even if applicable, arrested the tribal exercise of its power to exclude just as effectively as the 1927 Act.

CONCLUSION

For the reasons given above, the decision of the Court of Appeals should be reversed.

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